No. 07-1152

IN THE

Supreme Court of the United States

CHARLES ODELL WELDON, AND ERIC A. WILES, INDIVIDUALLY, AND IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION OF WRIT OF CERTIORARI

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May 12, 2008

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QUESTION PRESENTED

Whether Ohio may require plaintiffs bringing asbestos-related claims under the Federal Employer's Liability Act and the Locomotive Inspection Act to meet minimal medical requirements, as a means of managing the dockets of Ohio's overburdened courts, without offending the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULES 29.6 AND 14.1(d)

Respondent, Norfolk Southern Railway Company, is a wholly owned subsidiary of its parent corporation, Norfolk Southern Corporation, a publicly traded company. No publicly held company owns 10% or more of Norfolk Southern Corporation's stock.

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INTRODUCTION

The Petition for Writ of Certiorari raises no issue remotely worthy of review by this Court. Petitioners' principal claim – that the Ohio Revised Code sections enacted through Amended Substitute House Bill Number 292 ("H.B. 292"), Section 3(A)(3)(b), 150 Ohio Laws, Part III, 3970, are substantive state laws that "alter the evidentiary rules that long have governed claims brought under the [Federal Employers' Liability Act]" and "impose stricter threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court," Pet. 1 – depends upon resolving questions of both *state* and *federal* law that were neither presented to or decided by the Ohio Supreme Court, and are thus foreclosed from review by this Court. Indeed, as the state court observed, the Petitioners did not "file[] a merit brief in this case and, therefore, did not argue before this court." Pet. App. 7a.

Moreover, Petitioners' claims are improperly founded on a rejection of the Ohio Supreme Court's authoritative construction of Ohio law. The state court construed the statute to require no more than a preliminary evidentiary showing that the plaintiff had a good-faith basis for the claims asserted; this Court lacks power to adopt Petitioners' contrary construction of the state statute as imposing substantive evidentiary requirements beyond what is needed to prove the underlying claims at trial. Moreover, Petitioners' construction of the state statutes are self-evidently wrong. The Ohio statutes concern only issues of *medical* causation (i.e., whether the plaintiff has an asbestos-related

disease). Contary to Petitioners' claims, Ohio Revised Code Section 2307.92(B), for instance, has nothing to do with *legal* causation (i.e., whether a particular defendant can be held legally responsible for the injury). Furthermore, even if (contrary to fact) the statute did address legal causation, a "substantial contributing factor" standard is no stricter than the rule of proximate causation that this Court has always enforced under FELA, and thus the state statute alters no substantive rule of federal law. Petitioners' argument to the contrary is based on a misreading of *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957) – as three Justices of this Court explained in *Norfolk S. Ry. Co. v. Sorrell*, 127 S.Ct. 799 (2007). The *Sorrell* majority declined to resolve the question because the issue of the proper causation standard for railroad negligence was not raised to or decided by the state supreme court. *Id.* at 804-05. This Court should not chart a different course from *Sorrell*. Petitioners' failure to properly raise this issue in the Ohio Supreme Court compels denial of the petition.

These unresolved or foreclosed issues make this an improper vehicle to decide even the one issue that the Ohio Supreme Court did resolve – whether H.B. 292, if a procedural statute, nevertheless operates to lessen or destroy federal rights. On that question, Petitioners simply challenge the application of settled law to Ohio's statutes. There is no conflict on any issue of federal law between the holding below and any decision of this Court, a state supreme court, or a federal court of appeals. Moreover, the Ohio Supreme Court is incontrovertibly correct on the merits. H.B. 292, as construed by that court, is simply an administrative case prioritization mechanism that does not discriminate against federal claims, resolve any federal claim on the merits, or

affect or distort the adjudication of a federal claim on the merits. This Court has upheld state procedural rules that deprive a FELA plaintiff of a state forum altogether; *a fortiori*, a state procedural rule that neutrally delays adjudication of asbestos-exposed plaintiffs so that more urgent cases of plaintiffs with actual asbestos-related disease may be resolved first does not lessen or destroy federal rights in violation of the FELA. Indeed, as the Ohio Supreme Court held, very similar procedures are used to rationalize the administration of asbestos cases in federal court. In sum, this Court should deny the petition.

LEGISLATIVE BACKGROUND

A. The Purpose Of H.B. 292

This Court has characterized asbestos litigation as an "'elephantine mass'" of cases that "'defies customary judicial administration.'" *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003). Ohio in particular has been inundated with an overwhelming number of asbestos filings, and is "one of the top five state court venues for asbestos filings." Pet. App. 70a.[1]

In 2003, at least 35,000 asbestos personal injury cases were pending in Ohio's state courts and there appeared to be no end in sight because approximately 200 new asbestos cases were being filed every month. *See id.* In eighty-nine percent of the cases no claim for cancer was alleged and "[s]ixty-six to ninety per cent of these non-cancer claimants are not sick." Pet. App. 72a-73a.[2]

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[1] All citations to H.B. 292 will be to the version of H.B. 292 reproduced in Petitioner's Appendix.

[2] *Cf. Amchem Prods. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., dissenting), ("up to half of asbestos claims are now

Faced with overburdened dockets and an unending number of newly filed asbestos actions, Ohio's courts needed a mechanism to manage a large volume of asbestos cases on their dockets in a manner that ensures that sick claimants receive priority in the resolution and compensation of their claims and to weed out fraudulent claims generated by "screening" doctors hired solely to render a diagnosis for litigation.[3]

Finding that "[t]he current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike," Ohio's General Assembly enacted H.B. 292. Pet. App. 2a.

H.B. 292 went into effect on September 2, 2004. H.B. 292, 150 Ohio Laws, Part III, 3995. It enacted Ohio Revised Code Sections 2307.91 through 2307.98 to serve four primary purposes: (1) to give priority to claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve scarce resources to allow compensation for cancer victims while also securing a right to similar compensation

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being filed by people who have little or no physical impairment").

[3] The fraudulent practices of mass screening companies and physicians hired to diagnose claimants for the purpose of litigation was highlighted in *In re Silica Prods. Liab. Litig., MDL 1553*, 398 F.Supp.2d 563 (S.D. Tex. 2005). *In re Silica* also sheds light on the possible fraud "afflicting asbestos litigation for almost 20 years, resulting in billions of dollars of payments to claimants who weren't sick and to the attorneys who represented them." *See*, Roger Parloff, *Diagnosing For Dollars*, Fortune, June 13, 2005 at 98.

for those who suffer harm in the future. Pet. App. 74a.

The General Assembly enacted H.B. 292 as a *procedural* mechanism to enhance the ability of courts to manage and organize their dockets by prioritizing those asbestos claimants who can demonstrate impairment. *See, id.* At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos claims. *See, id.*

B. Ohio Revised Code Sections 2307.91 Through 2307.98

Ohio Revised Code §2307.92(B), enacted by H.B. 292, sets forth certain minimal medical criteria for non-malignant asbestos cases. It requires evidence that a competent medical authority took detailed occupational, asbestos-exposure, medical and smoking histories of the plaintiff, and diagnosed an asbestos-related, non-malignant condition based on those histories, as well as a medical examination and a pulmonary function test. *See,* §2307.92(B)(1)-(3). For complaints filed before the enactment of H.B. 292, like those at issue herein, these criteria were required to be filed within 120 days from the effective date of the statute. *See,* §2307.92(B) and §2307.93(A)(2).

If a plaintiff cannot meet the medical criteria, the case is administratively dismissed without prejudice. Ohio Rev. Code §2307.93(C). Under this procedure, the trial court retains jurisdiction over the case. The claim is preserved for purposes of the statute of limitations, and the dismissal does not count against the plaintiff. The case can be reinstated when the plaintiff complies with §2307.92(B).

H.B. 292 expedites the resolution of claims brought by truly sick claimants. Pet. 73a. *All* asbestos

claimants, including FELA and Locomotive Boiler Inspection Act ("LBIA") claimants, must meet these procedural medical requirements at the early stage of litigation in order to prioritize the cases on the trial court docket.

STATEMENT OF THE CASE

In September 1999, Petitioners, Charles Odell Weldon, and Eric A. Wiles, individually and in his capacity as executor of the Estate of Larry Arnold Wiles ("Petitioners"), filed complaints under the FELA and the LBIA against Respondent, Norfolk Southern Railway Company ("Respondent" or "Norfolk Southern") in the Cuyahoga County Court of Common Pleas alleging injuries caused by occupational exposure to asbestos during their employment with the railroad. Petitioners, who were residents of Salisbury, North Carolina at the time of filing their asbestos-related actions and did not work for the respondent in Ohio, had no connection with Ohio.

Petitioners failed to file the written medical reports and supporting test results required by Ohio Revised Code §2307.92(B). Due to Petitioners' failure to comply with these requirements, Norfolk Southern brought an action seeking a judgment declaring that: (1) the medical criteria and the administrative dismissal process contained in H.B. 292 applies to Petitioners' asbestos-related FELA/LBIA claims, and that (2) H.B. 292 does not infringe upon the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2.

The trial court denied Norfolk Southern's request for declaratory relief. The trial court determined that the application of H.B. 292 to the instant cases was preempted by the FELA and the LBIA. Pet. App.

32a-33a. The Eighth District Court of Appeals affirmed. *Norfolk S. Ry. Co. v. Bogle*, 850 N.E.2d 1281 (Ohio App. 2006). Pet. App. 31a.

The Supreme Court of Ohio reversed and remanded the trial and appellate courts' decisions. Pet. App. 15a. The court held that the prima-facie requirements contained in §2307.92 and the administrative dismissal mechanism contained in §2307.93, are procedural in nature and can be applied to claims brought in state court under the FELA and the LBIA, and that since no new substantive burdens are placed on asbestos claimants, these procedural statutes are not preempted by federal law. "[T]he impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." Pet. App. 7a. The court further acknowledged that Ohio Revised Code Sections 2307.92 and 2307.93 "apply to all asbestos claims filed in Ohio regardless of the theory or statutory basis giving rise to relief, and serve to make efficient use of judicial resources." Pet. App.15a.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner's Claim That The Statute Conflicts With FELA Causation Rules Is Not Preserved For This Court's Review.

Petitioner's principal contention is that H.B. 292 imposes a higher standard of legal causation at the early stages of litigation ("substantial contributing factor") than a FELA plaintiff needs to satisfy in adjudicating its claim on the merits against the railroad. Pet. 1, 14-18. Petitioners' position is erroneous as a matter of both state and federal law, but more fundamentally it is not preserved for this Court's review. This Court does not sit to decide

questions of state law, nor does it sit to review questions that were not decided by or presented to the Ohio Supreme Court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983).

Petitioners disregard their obligations under Sup. Ct. Rule 14(g)(i). In seeking review of the Supreme Court of Ohio's decision, they fail to specify in the statement of the case:

> the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears ***, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The reason for Petitioners' default is clear: the questions Petitioners now raise were not properly presented below. Petitioners did not ask the Ohio Supreme Court to render a construction of the term "substantial contributing factor" defined in Ohio Rev. Code §2307.92(B), nor did they argue to the court that the statute conflicted with any substantive FELA causation rule.[4] Norfolk Southern's position that H.B. 292 is procedural and therefore consistent with *Rogers* was uncontested before the Ohio

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[4] As noted above, Petitioners did not timely file a brief in the Ohio Supreme Court. Pet. App. 7a. While Petitioners did briefly raise the substantive-conflict argument to the court of appeals, they failed to properly renew that argument in the Ohio Supreme Court.

Supreme Court because of Petitioners' failure to diligently participate in the proceedings before the state supreme court.[5]

It is not this Court's province to decide threshold and potentially dispositive issues of state law. *See, Limbach v. Hoover & Allison*, 466 U.S. 353 (1984); *Green v. Frazier*, 253 U.S. 233 (1920). The Ohio Supreme Court authoritatively construed the state statute as placing "no new substantive burdens" on any claimant, regardless of the applicable law. Pet. App. 8a. Indeed, it construed the medical certification requirements of Ohio Revised Code §2307.92(B) to demand in substance no more than the existing procedural rule that "requires a party to certify, by signing a complaint, that there are 'good grounds to support it.'" Pet. App. 8a.

Remarkably, Petitioners dispute the Ohio Supreme Court's interpretation of state law. Arguing only from the text of the state statute, Petitioners argue (1) that the "substantial contributing factor" provision in §2307.92(B) defines an independent substantive standard of Ohio law (i.e., that it does not merely require medical certification of facts necessary to support a claim under the applicable substantive law, as the Ohio Supreme Court held), and (2) requires a certain quantum of evidence of legal causation that is higher than FELA requires for the plaintiff to prevail on the merits. But a state supreme court's construction of a state statute is authoritative and "[n]either this Court nor any other

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[5] The Ohio court of appeals likewise did not construe H.B. 292 as imposing substantive evidentiary burdens in conflict with *Rogers*; it simply found the delay entailed in the statutory procedures to "gnaw" at the roots of the federal right. Pet. App. 29a.

federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Additionally, the term "substantial contributing factor" is expressly defined in the state statute, Ohio Rev. Code §2307.91(FF), and it is unknown what gloss the state supreme court would place on those terms; absent an authoritative construction of that statutory definition, this Court cannot feasibly compare the state and federal laws. If Petitioners quarrel with the Ohio Supreme Court's construction of state law, they have only themselves to blame; they forfeited the opportunity to argue the construction of the state statute by failing to file a timely brief. Because Petitioners' federal claims derive from a construction of the state statute that was neither presented to nor adopted by the Ohio Supreme Court, and indeed requires a construction of state law contrary to the one adopted below, this Court cannot entertain them.

Moreover, Petitioners are simply wrong in claiming that Ohio Revised Code §2307.92(B)(2) states a rule of legal causation, much less one in conflict with any FELA rule. H.B. 292 addresses *medical causation*: whether any asbestos exposure was a substantial contributing factor to the claimed disease. Many symptoms alleged in asbestos litigation can be caused by numerous other agents or health conditions. *See, In re R.O.C.*, 131 S.W.3d 131, 137 (Tex. Ct. App. 2004). The object of H.B. 292 is simply to require a prima-facie showing that "a competent medical authority" has determined that the plaintiff has a true asbestos-related disease. Ohio Rev. Code §2307.92(B). The Ohio Supreme Court did not construe the state statute to require anything more than is necessary for a medical diagnosis that the

injury was attributable to asbestos as opposed to other factors. There is certainly no conflict with the FELA if §2307.92(B) is properly construed, as the Ohio Supreme Court did, as requiring a threshold prima-facie showing of asbestos-related disease. This Court has expressly held that a FELA plaintiff may only recover against a railroad that negligently exposed him to asbestos if he developed an asbestos-related disease. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 427 (1997).

The medical-causation requirement of §2307.92(B), which goes to the nature of the injury (is it asbestos-related disease or not), has nothing to do with *legal causation*, which is the question of whether a specific defendant can be held legally responsible for the injury in question. *See*, Restatement (Second) of Torts § 435 (1965). §2307.92(B) is wholly silent on that question. Even if *arguendo Rogers* stated a reduced legal-causation standard for railroad negligence, it would be completely compatible with §2307.92(B). The complaint would be placed on the active docket if it were shown that the plaintiff had an asbestos-related disease (i.e., that asbestos exposure was a substantial contributing factor to the disease); the railroad (under a *Rogers* standard) would be liable if its negligent acts exposing the defendant to asbestos played any part, even the slightest, in causing the asbestos-related disease, even if other defendants were responsible for a much greater amount of the plaintiff's asbestos exposure.[6]

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[6] In a footnote, Pet. 15 n.6, Petitioners argue that there is no possible FELA standard of legal causation as stringent as "substantial contributing factor." That is incorrect. Even if *arguendo* Ohio Revised Code §2307.92(B)(2) addressed legal causation, it would not be materially different from the "substantial factor" standard of Section 435 of the Restatement.

This points to a second fundamental flaw in the petition. Not only did Petitioners fail to properly present their *state law* construction of §2307.92(B) to the Ohio Supreme Court, but they never raised the *federal law* argument that *Rogers* abolished the federal rule of proximate cause in FELA actions in the courts below. Just last term, this Court refused to address this question when it had not been passed on by or presented to the Missouri Supreme Court. *Sorrell*, 127 S.Ct. at 804-05. There is no reason for a different result here; indeed, declination of review is even more necessary here because that important issue should be resolved in the context of an actual adjudication where causation is in dispute between the parties.

Moreover, Petitioners' claim that the FELA abrogated the doctrine of proximate cause in favor of a "slightest cause" standard (Pet. 14-15) is false. While *Rogers* rejected a particular state common-law conception of "proximate cause" that required a showing that the railroad's wrongful act was the "sole, efficient, producing cause of injury," 352 U.S. at 506, it has always been the rule in this Court's FELA precedents (before and after *Rogers*) that the plaintiff must prove that the railroad's negligence was either "the sole or a contributory proximate cause." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943); *Kernan v. American Dredging Co.*, 355 U.S. 426, 434 (1958).[7]

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[7] *See, e.g., Lang v. New York Cent. R.R.*, 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934) (same); *see also, e.g., St. Louis, Iron Mountain & S. Ry. v. McWhirter*, 229 U.S. 265, 280 (1913); *Davis v. Wolfe*, 263 U.S. 239, 243 (1923); *Davis v. Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis,*

As three justices explained in *Sorrell*, *Rogers* did not overrule the host of precedents applying proximate cause as the standard on which the jury must be instructed; it simply defined the standard for a jury question in cases involving multiple possible proximate causes. *Sorrell*, 127 S.Ct. at 809 (Souter, J. concurring.)

This Court cannot resolve the petition without deciding that (1) Ohio Revised Code Section 2307.92(B) requires a threshold prima-facie showing that is stricter than the federal legal causation standard under the FELA, and (2) that *Rogers* imposed a "slightest cause" standard that requires less proof than a "substantial contributing factor." Petitioners' interpretations of both state and federal law are flatly wrong and contrary to this Court's precedent, but more importantly they are not preserved for this Court's review because they were not properly before the court below. Moreover, the Ohio Supreme Court authoritatively construed the state statute not to require greater threshold evidentiary showings on any substantive element – whether injury or causation – than would be required to prove a FELA claim on the merits, and Petitioners cannot contest that construction in this Court. Certiorari should be denied.

St. Paul & Sault Ste. Marie Ry. v. Goneau, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R. v. Ambrose*, 280 U.S. 486, 489 (1930); *Swinson v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray*, 335 U.S. at 523 (1949); *Urie v. Thompson*, 337 U.S. 163, 195 (1949); *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter v. Atlantic & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949).

B. The Ohio Supreme Court's Ruling That The Statute Does Not Burden Federal Rights Is Correct And Does Not Conflict With Any Other Decision.

Yet another flaw in the petition is its confusion regarding this Court's "reverse-*Erie*" pre-emption precedents. The petition suggests that there are two distinct lines of federal preemption precedent: it claims that the Ohio Supreme Court's determination that §2307.92(B) is procedural runs afoul of *Felder v. Casey*, 487 U.S. 131 (1988), Pet. 14-18, and, in the alternative, even if §2307.92(B) is procedural, the decision below offends *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), *Norfolk Southern R.R. v. Ferebee*, 238 U.S. 269 (1915), and other FELA precedents of this Court holding that substantive federal rights "cannot be lessened or destroyed by a rule of practice," *Id.* at 273. Pet. 18-25.

Petitioners' analysis is unsound. The preemption standard is substantively the same in *Felder*, *Brown*, and *Ferebee* even though the Court at times uses different verbal formulations. Indeed, *Felder* specifically and repeatedly invoked *Brown* as the preemption rule that resolved the case, *Felder*, 487 U.S. at 138, 150, 152, and specifically held that *Brown* applied in substance the same "outcome-determinative" test established in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) for classic *Erie* issues. *Felder* held that a state

> may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when such claims are brought in federal court, for "'[w]hatever spring the State may set for those who are endeavoring to assert rights that the State confers, the

> assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown v. Western R. Co. of Alabama*, *supra*, 338 U.S., at 298-299, 70 S.Ct., at 108 (quoting *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143 (1923)).

Felder, 487 U.S. at 152.

Accordingly, Petitioners' complaint that the Ohio Supreme Court cited an Ohio case for the definition of when a case is procedural or substantive, Pet. 12 & n.4, is of no moment. As the Ohio Supreme Court correctly ruled, the characterization of a law as procedural "does not end the analysis, because procedural rules apply to federal claims only so long as they do not operate to impair a claimant's ability to enforce a federal right or cause of action." Pet. App. 8a (citing *Davis* and *Brown*). There is thus no conflict with *Felder* or any other precedent of this Court on the preemption standard to be applied. At the end of the day, Petitioners assert only error in the application of settled law to the issue at hand, which does not warrant this Court's review.

Nor does the Ohio Supreme Court's application of the preemption rule create any conflict with any decision of this Court or any other. As an initial matter, the same vehicle problems that foreclose review of part I.A of the petition also foreclose review of part I.B. Petitioners' claim in part I.B that Ohio Revised Code Section 2307.92(B) lessens and destroys federal rights in violation of *Brown* and *Ferrebee* by "impos[ing] preliminary evidentiary burdens that exceed the showings a FELA plaintiff would be required to make at trial or in federal court." Pet. 19. This self-serving construction of H.B. 292 was not properly presented to the Ohio Supreme Court.

Moreover, Petitioners' arguments that §2307.92(B) burdens federal rights is simply based on a misconception of the nature and operation of the statute.

Finally, review of Part II of the petition is unavailing for the simple reason that no conflict or confusion exists among state high courts on the issues addressed in the Supreme Court of Ohio's decision.

1. Petitioners Misstate The Legislative Intent Of H.B. 292.

Petitioners argue repeatedly that the primary purpose of H.B. 292 is to "reduce total liability paid by defendants in connection with asbestos claims." *See*, Pet. at 6, 12. Petitioners erroneously represent the "sole" purpose of H.B. 292 as protection of companies from bankruptcy and to diminish corporations' liability for asbestos-related actions.

Petitioners are grasping at straws. There is no basis for Petitioners' attempt to link a concern about rising bankruptcies with any substantive impairment of federal rights. The Ohio General Assembly's concern was the waste of corporate assets in defending the mass filings of plaintiffs who are not sick and the possibility that the funds will run out before sick plaintiffs can be compensated; indeed, more than half of the $54 billion expended in asbestos suits is absorbed by litigation costs. Pet. App. 69a-71a. This hardly translates into impairment of federal rights, when only asbestos-related disease caused by railroad negligence is compensable under FELA. *Metro-North*, 521 U.S. at 427.

Significantly, Petitioners' omit from discussion the additional sound public policy reasons behind the Ohio General Assembly's enactment of H.B. 292

which are expressly in the bill. *See*, Pet. App. 69a-74a. The four primary purposes of the statutes are: (1) to give priority to those claimants who can demonstrate actual physical harm caused by asbestos, (2) to preserve the rights of those who were exposed for future action, (3) to enhance the state's system of supervision and control over asbestos-related litigation, and (4) to conserve the scarce resources of the defendants to allow compensation for cancer victims while also securing a right to similar compensation for those who suffer harm in the future. Pet. App. 74a.

The medical criteria and administrative dismissal process of H.B. 292 are procedural and were enacted in response to the asbestos litigation crisis in Ohio. *Id.* The legislative findings and history demonstrate that Ohio Revised Code Sections 2307.92(B) and 2307.93(C) are intended to manage the procedural aspects of asbestos cases by prioritizing these cases through the use of medical criteria and the administrative dismissal process. *See*, Pet. App. 74a. Since these requirements are procedural and not substantive, they are applicable to asbestos-related FELA/LBIA claims filed in state court without offending the Supremacy Clause. U.S. Const. Art. VI, Cl. 2.

2. The Decision Below Does Not Conflict With Decisions Of This Court.

As this Court has stated repeatedly,

> "The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the state create a court competent to hear the case in which the federal claim is presented. The general rule, 'bottomed

> deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' The states thus have great latitude to establish the structure and jurisdiction of their own courts."

Johnson, 520 U.S. at 919, citing, *Howlett v. Rose*, 496 U.S. 356 (1990), internal quotations omitted. H.B. 292 falls within the State's purview to establish the structure of its own courts. The decision below is not comparable to any of this Court's decisions which have struck down statutes that either imposed substantive law requirements or outcome-determinative procedures that could result in dismissal with prejudice or a judgment in favor of the defendant.

The Ohio Supreme Court's decision does not conflict with *Felder v. Casey*. Under the Wisconsin statute in *Felder*, notice of intent to file a 42 U.S.C. §1983 claim was to be provided to the defendant-governmental entity 120 days *prior* to filing a lawsuit. A civil rights claimant had to seek satisfaction in the first instance from the governmental defendant prior to filing suit.

In striking down the Wisconsin statute, this Court determined that the notice-of-claim statute "confer[ed] on governmental defendants an affirmative defense" that could result in dismissal with prejudice. *See Felder*, 487 U.S. at 144. The statute was outcome-determinative because it could result in a judgment on the merits for defendants. *See, id.* The Court held that the statute effectively changed the substantive elements of the cause of action. *See, id.*

In contrast to the Wisconsin statute, H.B. 292 does not alter the substantive elements of FELA claims or defenses or otherwise slant the adjudication of the claim on the merits in favor of the defendant. Failure to meet the requisite medical criteria under H.B. 292

results in an administrative dismissal *without prejudice*. *See*, Ohio Rev. Code §2307.93(C). A plaintiff's claim is afforded several protections under this procedure: the administrative dismissal does not effect the merits of plaintiff's claim, and the claim is preserved for purposes of the statute of limitations. *Id.* Also, the case can be reinstated on the trial court docket when the plaintiff complies with §2307.92(B).

Because the Ohio Supreme Court authoritatively construed H.B. 292 to do "[n]othing more" than "establish a procedural prioritization of the asbestos-related cases on the court's docket," Pet. App. 7a, it is also fully distinguishable from this Court's precedents holding that FELA preempts local substantive standards governing the burden of proof and the review of jury verdicts in adjudication on the merits. *See*, *Brady*, 320 U.S. at 479, (requiring federal standard of sufficiency of evidence to establish FELA liability); *Central Vt. Ry. v. White*, 238 U.S. 507, 512 (1915) (state rule regarding burden of proof of contributory negligence preempted); *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367 (1918) (Mississippi statute creating a "presumption of negligence" against the railroad preempted); *Dice v. Akron, D.&Y.R. Co.*, 342 U.S. 359, 363 (1952) (preempting state rule that judges and not juries decide issues of fraud in the execution of a release because "depriv[ing] railroad workers of the benefit of a jury trial where there is evidence to support negligence is to take away a goodly portion of the relief which congress has afforded to them). H.B. 292 does not alter the adjudication of FELA claims on the merits, limit jury powers, define burdens of proof, or set standards for sufficiency of the evidence. H.B. 292 merely provides for the procedural mechanism by which a plaintiff must certify the evidence supporting

a claim that the defendant's negligence resulted in asbestos-related disease. No final determination relating to any portion of a plaintiff's FELA claim is made under H.B. 292.

Petitioners' reliance on *Brown v. Western Ry. of Alabama* is similarly misguided. The holding in Brown is limited to the facts of that case. *See*, 338 U.S. at 299. In *Brown*, a federal right was defeated by Georgia's local rules. *See*, *id.* at 296. The rule of practice in *Brown* was severely weighted against the plaintiff in that a mere technical failure to properly plead the case resulted in a dismissal with prejudice of the plaintiff's FELA claim, precluding future recovery.

H.B. 292 does not result in a dismissal with prejudice. "A claimant who fails to comply with the requirements faces administrative dismissal *without* prejudice, and the case effectively becomes "inactive" for purposes of discovery and trial." Ohio Rev. Code §2307.93(C), Pet. App. 13a. As noted above, the Ohio Supreme Court held that the requirements of H.B. 292 do not impose any new substantive burdens on plaintiffs because under Rule 11 of the Ohio Civil Rules of Procedure, a party or an attorney is already required to certify, by signing a complaint, that "good grounds" exist for the lawsuit. Pet. App. 8a. H.B. 292 simply requires the plaintiff to produce the documentation that supports the already-required good grounds for bringing the claim in the first place.

What further distinguishes H.B. 292 from the rule at issue in *Brown* is that FELA asbestos actions filed in state and federal courts are subject to similar procedures used to facilitate, manage, and organize asbestos FELA/LBIA cases. Pet. App. 14a. Despite Petitioners' arguments to the contrary, preservation of a claim until proper evidence to support the claim

is produced, is a far cry from "de facto dismissal with prejudice." *See*, Pet. 20. H.B. 292 does not affect the merits of the asbestos-plaintiff's claim.

H.B. 292's function is to manage and organize the docket of Ohio courts by prioritizing asbestos claims. It allows claimants who can demonstrate impairment to bring forth their evidence before non-impaired claimants can do so. At the same time, H.B. 292 fully preserves the rights of the unimpaired claimants to pursue their asbestos claims. Such requirements do not conflict with the decisions of this Court.

3. The Supreme Court Of Ohio Did Not Err In Relying On This Court's Analysis In *Bombolis* And *Mayfield*.

Because H.B. 292 is strictly a procedural statute that does not impair substantive rights, it is fully within the domain of state laws that apply in FELA actions in state court. *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). The Ohio Supreme Court correctly invoked *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1960), which upheld an outcome-neutral rule that jury verdicts need not be unanimous. Petitioners question the authoritativeness of *Bombolis*, but it has not been overruled by this Court and remains good law.

The Ohio Supreme Court also cited to *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950), to compare the forum non conveniens doctrine to the procedural requirements of H.B. 292. As stated by the Supreme Court of Ohio, states can employ the doctrine of forum non conveniens so long as the application does not work to discriminate against federal claims. "[N]othing in the FELA purport[s] 'to force a duty' upon the state courts to entertain or

retain Federal Employers' Liability litigation 'against an otherwise valid excuse.'" Pet. App. 10a.

If a state court can apply the doctrine of forum non conveniens to FELA claims to eliminate such a claim from its dockets, certainly Ohio can apply H.B. 292 to FELA claims because it does not create such a harsh result. The provisions of H.B. 292 provide the means by which Ohio's courts can prioritize and manage its dockets. A FELA/LBIA plaintiff's asbestos-related action is retained by Ohio's courts and measures of protection of the claim are provided under the statutory provisions enacted by H.B. 292.

In questioning the Ohio Supreme Court's decision, Petitioners ignore *Johnson v. Fankell*, upon which the Ohio court also relied. In *Johnson*, this Court upheld a state court procedural rule that differed from a federal rule.

In *Johnson*, the defendant filed a motion to dismiss a §1983 action pending in state court based on a qualified immunity defense. The trial court denied the motion and the defendant appealed. The state court dismissed the appeal.

If the §1983 action had been filed in federal court, a denial of the motion to dismiss would be immediately appealable. *See, Johnson*, 520 U.S. at 915. The defendant in *Johnson* argued that because the plaintiff asserted a federal claim under a federal statute, and the defendants were asserting a defense provided by federal law, then the state court must allow the same interlocutory appeal available in federal court. The defendant in *Johnson* argued, like Petitioners argue, that preemption was necessary to avoid different outcomes in state and federal courts in §1983 litigation. *See id.* at 918. This Court disagreed, upholding the state court's interpretation

of its procedural rules relating to the ability to appeal. This Court reasoned that states have great latitude to establish the structure and jurisdiction of their own courts. *See, id.* at 919, citing, *Howlett*, 496 U.S. 356.

Contrary to Petitioners' position, H.B. 292's requirements do not burden a FELA/LBIA plaintiff's substantive federal rights, and thus, the Ohio Supreme Court did not err in applying these requirements to Petitioners' asbestos-related FELA/LBIA actions filed in Ohio's courts.

4. Petitioners' FELA/LBIA Asbestos Actions Would Be Subject To A Process Of Prioritizing And Administrative Dismissal In Federal Court.

Petitioners argue that H.B. 292 creates a disparity between asbestos-related FELA/LBIA claims filed in state and federal courts within Ohio. This statement is incorrect because when a plaintiff files an asbestos-related FELA/LBIA claim in federal court, the case is transferred to a special multi-district litigation docket for handling. If the asbestos action does not meet the requirements for active processing, it is administratively dismissed until the plaintiff is able to satisfy the certain requirements.

For many years, federal courts have utilized a mechanism for managing and organizing asbestos cases similar to the framework in H.B. 292. *See, Smith v. Gulf Oil Co.*, 995 F.2d 638, 639 (6th Cir. 1993) (In 1987, the Northern District of Ohio created a special Maritime Asbestos Litigation Docket, "MARDOC.") All asbestos-related claims filed in Ohio's federal courts are transferred to the Judicial Panel on Multi-District Litigation at Civil Action No. MDL 875 ("MDL 875"). *See, In re Asbestos Prod.*

Liab. Litig., 771 F.Supp. 415, 422-23 (J.P.M.L. 1991). The case management order that governs MDL 875, Administrative Order No. 8, sets forth a mechanism for managing and organizing asbestos cases similar to the framework in H.B. 292. *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002).

Administrative Order No. 8 states:

> "The Court has the responsibility to administratively manage these cases so as to protect the rights of all parties, yet preserve and maintain any funds available for compensation to victims."

Similar concerns relating to the preservation of funds for those who are most sick were expressed by Ohio's General Assembly. *See,* Pet. App. 72a-74a.

Administrative Order No. 8 gives priority to malignant and other serious health cases over asymptomatic claims. *Compare,* Pet. App. 74a. Administrative Order No. 8 acknowledges the importance of "doctor-patient medical report[s] setting forth an asbestos related disease." Similarly, Ohio Revised Code §2307.91(Z)(2) requires the doctor diagnosing the alleged asbestos-related disease to be a "medical doctor [who] is actually treating *** the exposed person."

Administrative Order No. 8 expresses concern with suits instituted as a result of "report[s] to attorney[s] from a screening company *** because *** a suit is then commenced without verification. Often times these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future." The Ohio General Assembly expressed these same concerns in H.B. 292 (A)(5) and addressed this issue

by enacting Ohio Revised Code §2307.91(Z)(3)(c), which states that a doctor who diagnoses an asbestos related impairment cannot rely on law firm sponsored screening reports.

Administrative Order No. 8 and H.B. 292 are similar in several respects: (1) both seek to give priority to cases where the asbestos-related impairment is diagnosed through a doctor-patient relationship and not through law firm sponsored screenings; (2) both seek to give priority to and preserve resources for those plaintiffs who are most sick; (3) both provide for an administrative dismissal of those cases not meeting the requirements; (4) both preserve the claim for purposes of statute of limitations if the case is administratively dismissed; (5) both retain jurisdiction over administratively dismissed actions; and (6) both permit the plaintiff to move to reinstate his/her case upon showing evidence of asbestos exposure and evidence of an asbestos-related disease.

It is disingenuous for Petitioners to dismiss the significance of Administrative Order No. 8 in MDL 875 as a "single district court decision." Pet. 24. Any pending asbestos actions not in trial at the time of MDL 875's creation were transferred to MDL 875 for handling. *In re Asbestos*, 771 F.Supp. at 424. Asbestos actions from 87 federal districts were transferred to MDL 875, and subject to Administrative Order No. 8. *See, id.* at 416. Any plaintiff who files an asbestos-related FELA claim in any these 87 federal courts must meet the requisite requirements for active processing.

The Ohio Supreme Court found its ruling of non-preemption "fortified" because the federal MDL court had adopted "a similar method to prioritize asbestos-related cases." Pet. App. 14a. Although the Ohio

statute is more detailed, both similarly required "'a doctor-patient medical report setting forth an asbestos-related disease.'" *Id.*, quoting *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, *1 (E.D. Pa. Jan. 16, 2002). Petitioners' contention that the federal and Ohio procedures are dissimilar is based solely on their impermissible contrary construction of the state statute as imposing additional substantive requirements. Pet. 24-25.

The procedure implemented in federal court has never been found to be in conflict with or frustrate the FELA or the LBIA. Had the FELA/LBIA actions at issue been filed in federal court, Petitioners would have been subject to the federal process of prioritizing and administrative dismissal of cases, which is similar to the requirements of H.B. 292.

5. The Ohio Supreme Court's Decision Does Not Conflict With Or Demonstrate Confusion Among State High Courts.

Petitioners cannot allege any direct conflict with any decision of any other state supreme court (or federal court of appeals). Instead, they speak vaguely of "confusion in state courts regarding FELA preemption" and the need for uniformity.

As an initial matter, review of the Ohio Supreme Court's decision here will not create "uniformity" on these issues. To the extent that there is any confusion (and Petitioners demonstrate none), at most such confusion would "'point up the impossibility of laying down a precise rule to distinguish "substance" from "procedure."'" *St. Louis Sw. Ry. Co.*, 470 U.S. at 411, quoting *Brown*, 338 U.S. at 296. This case is no different and its review by this Court does not alter the realization, expressed in

Dickerson, that uniformity in this area is an "impossibility."

Petitioners' attempt to create a conflict with *Daimler Chrysler Corp v. Ferrante*, 637 S.E.2d 659 (Ga. 2006) is also misplaced. The Ohio Supreme Court's decision does not conflict with *Ferrante* because, although both cases analyze state statutes establishing minimum criteria for asbestos-related claims, there are significant differences in how asbestos cases are handled when threshold requirements are unmet.

Such cases in Ohio are administratively dismissed, "a procedure by which the case is essentially rendered inactive, but the court retains jurisdiction over the matter." Pet. App. 3a, citing Ohio Rev. Code §2307.93(C). "A claimant may reinstate the case if the claimant 'makes a prima-facie showing that meets the statutory minimum medical requirements.'" *Id.*

By contrast, in Georgia, a case not in compliance with the statute is dismissed out right, albeit "without prejudice." *See*, OCGA §51-14-5(a). The claim is not preserved for purposes of the applicable statute of limitations. For that reason, the law in Georgia does impair a substantive right, unlike the law in Ohio. Therefore, no conflict exists between the Georgia Supreme Court treatment of its asbestos law and the Ohio Supreme Court's treatment of H.B. 292. This Court does not issue advisory opinions. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S.Ct. 2411, 2419 (2007). Granting certiorari here will only give rise to the Court's issuance of an advisory opinion on a question that is not properly before it. *Alabama v. Shelton*, 553 U.S. 654, 676 (2004) (Scalia, J., dissenting); *Republic Nat'l Bank of Miami v. United*

States, 506 U.S. 80, 99 (1992) (Thomas, J., concurring.)

On those occasions when this Court has agreed to hear appeals based upon conflicts between decisions of the highest state courts on a federal question, it has done so when there is a conflict that concerns the same federal question. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 423 (2004); *Illinois v. Wardlow*, 528 U.S. 119, 123, f.n. 1 (2000); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780, f.n. 10 (1981); *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 40-41 (1977). This is not such a case. The decisions cited by Petitioners as indicative of supposed confusion among and conflict between the state high courts are not on the same issue decided by the Ohio Supreme Court. There is no conflict or confusion resulting from the Ohio Supreme Court's decision.

Unlike the cases cited by Petitioners, the application of H.B. 292's prioritization of asbestos litigation does not implicate the merits of FELA/LBIA asbestos claims or impair the ability to recover in FELA/LBIA cases. The issue before the Ohio Supreme Court did not necessitate an analysis of sufficiency of evidence or general standards of proof that dictate whether an FELA/LBIA plaintiff can recover. This case is easily distinguishable from the line of cases cited by Petitioners that dealt with those precise substantive issues impacting the ability to recover on FELA claims. *See, Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20 (S.C. 2008); *Haselden v. Atlantic Coast Line R.R. Co.*, 53 S.E.2d 60 (S.C. 1949); *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162 (Tex. 2002); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428 (D.C. 1994); *Adair v. Northern Pac. Ry. Co.*, 392 P.2d 830 (Wash. 1964); *Kauzlarich*

v. Atchison, T. & S.F. Ry., 910 S.W.2d 254 (Mo. 1995). Indeed, the statute forecloses any use of the prima-facie certification at trial on the merits as evidence, evidentiary presumption, or as the basis for any disposition on the merits. Pet. App. 57a-58a. In accord with the general principles set forth in these cases, the Ohio Supreme Court recognized that the FELA/LBIA preempts state substantive regulation. Pet. App. 5a. No conflict or confusion is present on this issue.

Nor is any conflict between the decision below and a "second line of state high courts" that Petitioners characterize as holding "that a conclusion that a rule is procedural is the beginning and end of the inquiry as to whether a rule may be applied to FELA claims." Pet. 27. First, if there were any such "second line" of cases, they would already be overruled by *Brown*; there is no need for this Court to grant review in this case to pronounce on the undisputed error of other courts. Second, there is no such "second line" of cases stating such a categorical position. For example, *Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006 (Miss. 2006), simply holds that a state court can issue discovery sanctions under state law even if they cost the plaintiff his substantive rights: "[t]hat Allen's substantive rights were affected when his case was dismissed is without doubt, but such is the nature and purpose of sanctions for discovery violations and hindering the discovery of truth in a lawsuit." *Id.* at 1015.

In *Rule v. Burlington N. & Santa Fe Ry.*, 106 P.3d 533 (Mont. 2005), the court did not assess the burden on FELA rights as a result of application of the state's venue rules because this Court had already held that applying a state's venue rules to FELA cases is permissible. *Id.* at 536, quoting *Miles v.*

Illinois Cent. R.R. Co., 315 U.S. 698, 703 (1942). Similarly, no assessment of the burden of FELA rights needed to be made in *Alabama Great S. R.R. v. Jackson*, 587 So. 2d 959 (Ala. 1991) because, in the end, the court held that, even under the states "substantial evidence" rule, the plaintiff has presented sufficient evidence to sustain his claim of negligent infliction of emotional distress in an FELA case. *Id.* at 964. There is not a "second line of state high courts" that have created a different test for determining whether a state's procedural rules unduly impact FELA rights. Plaintiffs' claim of a conflict of authority on FELA preemption is strained.

As there is no confusion or conflict among the state high courts, there is no need for this Court to grant certiorari here. The decision below faithfully applied relevant precedent, and Petitioners, at best, merely ask the Court to examine whether the Ohio Supreme Court correctly applied settled law. Petitioners may quarrel with how the Ohio Supreme Court applied the law to the facts of the case, but that is not the sort of "error" worthy of a grant of certiorari. Sup. Ct. Rule 10. There is no reason why this Court should review a ruling that in no way conflicts with the decisions of this Court or other courts of appeals.

Quite apart from Petitioners' failure to satisfy the criteria of Sup. Ct. Rule 10, review is also unwarranted because this case is an exceptionally poor vehicle to resolve any question presented. The Ohio Supreme Court's decision appropriately and correctly construes the law in Ohio. Its application outside Ohio, should other states enact asbestos-reform legislation in the future, is speculative at best.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Wherefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 12, 2008